STATE OF WASHINGTON

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B U L L E T I N

No. 79-4

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Subject: SUBROGATION CLAUSES, WHAT IS ACCEPTABLE.

A recent Washington State Supreme Court decision, Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, has caused us to review subrogation clauses that are being used in insurance policies and in health care service contractor and health maintenance organization contracts.

In that case, the supreme court considered the allocation of the proceeds of a tort settlment, as between an insured and an insurer, upon the contention of the insurer that the proceeds should be allocated first to the special damages covered by the insurance policy or, in the alternative, prorated between the general damages and the covered damages. The court stated the general rule to be that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, after the insured is fully compensated for his loss.

The supreme court found, and we agree, that the more equitable approach, where a subrogation provision is utilized, is to permit the insured to recoup his general damages from the tort-feasor before allowing subrogation, provided, of course, that in so doing he does not prejudice the rights of his insurer. As stated by the court:

> Such a rule, we believe, accords more with the undertaking of the insurer and the reasonable expectations of the insured, than does a rule requiring proration of the recovery.

RCW 48.01.030 imposes the requirement of equity in all insurance matters It follows that my office will not approve or allow subrogation provisions that deny full recovery to an insured. It should be emphasized, however, that this need not result in duplicate payments to an insured. There is a difference between being "made whole" and receiving a double recovery.

Obviously, modification of existing subrogation clauses in conflict with the intent of this Bulletin will result in some loss of subrogation monies. We have concluded, however, that such loss is relatively insignificant when measured against premiums received. In any event, to paraphrase the supreme court, we prefer to follow a rule embodying the socially desirable policy of fostering adequate indemnification of innocent accident victims.

Each carrier--insurance companies, health care service contractors and health maintenance organizations--should review its subrogation clauses and make such changes as are necessary to conform to the rationale herein expressed.

DICK MARQUARDT
Insurance Commissioner